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No. 08-207

Supreme Court, U.S.
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In The
Supreme Court of the United States

JACK YETIV and ASPENWOOD APT. CORP.,

Petitioners,

v.

HELEN HUEY AND BEATRICE LINK,

Respondents.

On Petition For A Writ Of Certiorari
To The Court Of Appeals
For The First District Of Texas

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The gravamen of Respondents' Brief in Opposition is that Petitioners Aspenwood Apt. Corp. and Jack Yetiv (collectively "Aspenwood") have "misunderstood" why the Texas appellate court concluded that Aspenwood was collaterally estopped from pursuing its §1983 claims against Respondents Huey and Link. Specifically, Respondents argue that the Texas appellate court did not render its decision as a result of misunderstanding that the "policy-practice" element does not apply to §1983 suits against governmental actors sued in their individual capacity, but rather, because Aspenwood had failed to plead or prove the "under color of state law" element of all §1983 claims.

Respondents also argue that a remand by this Court would not alter the final outcome of this case because Respondents would supposedly be able to obtain summary judgment after remand pursuant to alternative state-law bases. What Respondents fail to explain is why state-law bases which they presented to – but were never credited by – the Texas lower courts the last time around would all of a sudden be found meritorious after remand by this Court. In addition, these supposed alternative state-law bases are generally premised on the misperception that Aspenwood's failure to establish the "policy-practice" element in its case against the City of Houston somehow precludes its federal §1983 claims against Huey and Link in their individual capacity.

As shown below, neither of Respondents' arguments in opposition are persuasive.

A. The Texas appeals court did not affirm summary disposition of Aspenwood's §1983 claims against Huey and Link because Aspenwood had failed to show the "under color of state law" element.

The following three arguments show that the Texas appeals court rendered its decision because of its erroneous conclusion that Aspenwood had to demonstrate "policy-practice" in order to prevail on its §1983 claims against Huey and Link in their individual capacity – not because of Aspenwood's failure to plead or prove the "under color of state law" element.

1. Despite Respondents' arguments to the contrary, the appeals court clearly stated that Aspenwood would have to "relitigate" the "policy-practice" issues in order to prevail on its §1983 claims against Huey and Link in their individual capacities.

Notwithstanding Respondents' arguments to the contrary, the appeals court clearly held that Aspenwood was collaterally estopped from litigating its case against Huey and Link in their individual capacity because Aspenwood would be unable to prove "policy or practice," as follows (Pet. App. 9):

> However, this Court reversed those findings and held that (1) there was no evidence that "Houston City Council executed a policy statement, ordinance, regulation or decision to demolish or illegally search low-income housing or withhold permits" and (2) there was no evidence "of a persistent, widespread, permanent or well-settled custom or usage to demolish or illegally search low-income housing or withhold building permits. This Court's determination of the issues was essential to the judgment in Yetiv's action against the City. ***Relitigation of these same issues would be necessary in Yetiv's current action against Huey in order to determine whether her actions could be fairly attributed to the City so that it may be said that she was acting "under color of state law." As a result, Yetiv is collaterally estopped from relitigating these issues in the proceedings against Huey.***

2. As admitted municipal employees, Huey and Link clearly took their wrongful actions "under color of state law."

In addition, there cannot be (and there never has been!) any argument made or evidence adduced in this case that Huey (a sitting City councilmember) and Link (an assistant director of a large department in the City of Houston) were *not* municipal employees who took the wrongful actions found by the jury "under color of state law." The "under color of state law" requirement is met simply by showing that the

actions were taken by a municipal employee. *See Monroe v. Pape*, 365 U.S. 473, 484 (1960) (alleging that defendants were City of Chicago police officers was sufficient to show that they took their actions under color of state law);[1] *see also West v. Atkins*, 487 U.S. 42, 50 (1988) ("State employment is generally sufficient to render the defendant a state actor . . . Thus, generally, a public employee acts under color of state law while exercising his responsibilities pursuant to state law.").

3. The appeals court could not have decided the case on the basis of the "under color of state law" element because this issue was *never* raised by Respondents in any pleading in this case – other than in their Brief in Opposition.

Third, and perhaps most importantly, contrary to Respondents' arguments in this Court, the Texas appeals court could not have possibly decided this case pursuant to the "under color of state law" element because *neither Huey nor Link ever made this*

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[1] The *Monroe* court cited with approval its previous decision (*U.S. v. Classic*, 313 U.S. 299, 326 (1941)) which defined "under color of state law" as follows: "The alleged acts of appellees were committed *in the course of their performance of duties* under the Louisiana statute requiring them to count the ballots, to record the result of the count and to certify the result of the election. *Misuse of power*, possessed by virtue of state law and made possible only because the wrongdoer *is clothed with the authority of state law*, is action taken "under color of state law."

argument in either the trial or the appellate courts in Texas. Indeed, although the "under color of state law" phrase appears thirteen times in Respondents' Brief in Opposition, *this phrase does not appear even a single time* in either Huey's (Second Supp. C.R. 1) or Link's (C.R. 85) dispositive pleadings in the trial court nor in their briefs before the Texas appellate court or the Texas Supreme Court.

Thus, it is clear that the Texas appellate court did not affirm on the basis of the "under color of state law" element, but rather, due to its confusion relating to the "policy-practice" element.

As Aspenwood pointed out in its Petition, it is true that the Texas appeals court also confused the "policy-practice" element with the "under color of state law" element, but this confusion – also shown by Respondent's counsel in their Brief in Opposition – simply demonstrates that this area of federal law is deserving of review by this Court.

B. Respondents' other arguments in opposition to the grant of certiorari are also unpersuasive.

1. This Court has jurisdiction because the lower court's error involved the misapplication of federal law and resulted in the summary preclusion of Aspenwood's federal claim.

In a misdirectional argument, Respondents suggest that the real issue in this case is the "fact-bound"

application of the state-law collateral estoppel doctrine. It is not. Rather, the real issue here is that collateral estoppel was applied because the Texas court erroneously extended the "policy-practice" requirement to the claims against municipal officials in their individual capacity, thereby precluding Aspenwood's pursuit of an important federal remedy. The 42 U.S.C. §1983 statute was primarily enacted in order to give citizens a means of constitutional redress when state laws did not afford such means.[2] The Texas appellate court's decision – wrongly utilizing a state estoppel doctrine to invalidate a federal remedy – flies in the face of why the §1983 remedy was enacted in the first place.

2. This Court's resolution of the question presented by Aspenwood's petition will influence the outcome of not only this case but also many other 42 U.S.C. §1983 cases.

In their last argument, Respondents opine – without citation to any part of the record nor to any legal authority – that "this Court's resolution of the

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[2] "The central aim of the Civil Rights Act was to provide protection to those persons wronged by the '[misuse] of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *Owen v. City of Independence*, 445 U.S. 622, 650 (1980), citing *Monroe v. Pape*, 365 U.S. 167, 184 (1961), itself citing *United States v. Classic*, 313 U.S. 299, 326 (1941).

question presented by the petition is unlikely to affect the outcome below." Opp. Cert. 18. The gravamen of Respondents' argument here is that even if this Court were to reverse the Texas courts and allow Aspenwood to pursue its §1983 claims against Huey and Link in their individual capacity, such remand would somehow be invalidated because Respondents allegedly have other state-law bases for precluding Aspenwood from pressing its §1983 claims against Respondents.

This is not correct. First, Respondents' alternative state-law bases were never credited by either the Texas district court, nor by the Texas appeals or Supreme Court. Indeed, the appeals court's decision relied *solely* on its confused application of the "policy-practice" element.

Second, even a brief analysis of Respondents' "alternative grounds" show that they would have *no* impact on Aspenwood's §1983 claims against Respondents on remand. For example, the Texas Tort Claims bar mentioned by Respondents (even if it applied, which it does not) cannot preempt the federal §1983 statute. Second, as Aspenwood pointed out below, the doctrine of *res judicata* has no relevance here because that doctrine applies only when litigation of a *first* case has some preclusive effect on the litigation of a *second* case. The case at bar is a single case that was filed in 1994 and is now in its fifteenth year. Therefore, *res judicata* does not apply. Third, Respondents suggest a spurious limitations defense. Aspenwood has always retained its §1983 claim against Huey,

and the §1983 claim against Link would properly relate-back to the original filing for limitations purposes.

The §1983 federal remedy was enacted *precisely* to preclude the sort of end-run achieved by the Texas court decisions in this case. Therefore, if this Court reverses due to the Texas courts' misunderstanding of §1983 law, that reversal should not then be again undone by the subsequent misapplication of some state-law doctrine that seeks to invalidate the Supremacy Clause.

Therefore, it seems likely that a remand by this Court will finally allow Aspenwood to obtain redress for constitutional injuries that the 1997 jury found had occurred – and for which Huey and Link were largely responsible.

CONCLUSION

In this case, the jury found that the City of Houston violated Petitioners' Fourth, Fifth and Fourteenth Amendment rights by withholding building repair permits and illegally searching Aspenwood's property. Petitioners did everything a reasonable property owner could possibly do to get permits, but it was only by suing the City that Petitioners were finally able to get those permits. Instead of issuing the permits, the City marshaled the full force of its police power and retaliated against Aspenwood with a massive raid more fitting of a drug

bust of a narcotic kingpin rather of a city's dealing with a law-abiding businessman trying to rejuvenate low-income apartments.

Although the first court of appeals panel concluded that Aspenwood should be allowed to pursue its §1983 claims against Huey and Link in their individual capacity, the second panel – disregarding the "law of the case" doctrine – somehow reached the opposite conclusion.

Therefore, Aspenwood finds itself in the position of a plaintiff who has obtained jury findings that it suffered constitutional injuries at the hands of municipal wrongdoers, yet, via a misapplication of federal law by the state court, Aspenwood has been precluded from collecting any damages at all for the multiple constitutional injuries that the jury found.

The Texas state courts – under the guise of collateral estoppel – have basically preempted the §1983 statute.

As Aspenwood has shown in its briefing, the "under color of state law" requirement and the "policy-practice" element are distinct. The fact that both the Texas courts and opposing counsel are confused about this would suggest that this case is worthy of review. In addition, given that many §1983 suits involve the interplay between governmental and

individual liability, this fact pattern arises frequently, not only in Texas but across the United States.

Respectfully submitted,

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